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Supreme Court, U.S.
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No. 02-1735

In the Supreme Court of the United States

CALIFORNIA TROUT, INC.

Petitioner,

v.

UNITED STATES FEDERAL ENERGY REGULATORY COMMISSION, SOUTHERN CALIFORNIA EDISON COMPANY

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR SOUTHERN CALIFORNIA EDISON COMPANY IN OPPOSITION

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QUESTION PRESENTED

1. Whether the issuance or waiver of a water quality certificate under Section 401 of the Clean Water Act, 33 U.S.C. § 1341(a), was required prior to the Federal Energy Regulatory Commission issuing an annual license to Southern California Edison Company for the Santa Ana River Nos. 1 and 3 Hydropower Project under Section 15(a)(l) of the Federal Power Act, 16 U.S.C. § 808(a)(l)?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court, Southern California Edison Company ("SCE") hereby discloses the following:

SCE is a California corporation having its principal place of business at 2244 Walnut Grove Avenue (Post Office Box 800), Rosemead, California 91770. SCE is an investor-owned public utility primarily engaged in the business of purchasing, generating, transmitting, distributing, and selling electric energy at wholesale and retail in the State of California. SCE has issued equity or debt securities to the public and its preferred stock is held by public investors.

An SCE subsidiary, SCE Funding LLC, has also issued debt securities to the public. SCE Funding LLC is a Delaware limited liability company that acts as a funding vehicle for financing certain SCE corporate purposes.

SCE is a subsidiary of Edison International, a holding company that owns all of the common stock of SCE. Edison International is a California corporation that was organized principally to acquire and hold securities of other corporations for investment purposes. Edison International has issued equity or debt securities to the public.

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BRIEF FOR SOUTHERN CALIFORNIA EDISON COMPANY IN OPPOSITION

OPINIONS BELOW

Southern California Edison Company ("SCE") is satisfied with the presentation in the California Trout ("Petitioner") Petition for Writ of Certiorari ("Petition").

JURISDICTION

SCE is satisfied with the presentation in the Petition.

STATUTORY PROVISIONS INVOLVED

SCE is satisfied with the presentation in the Petition.

STATEMENT OF THE CASE

SCE owns the Santa Ana River ("SAR") Nos. 1 and 3 Hydropower Project ("Project"), located in San Bernardino County, California. Project operation is subject to regulation under the Federal Power Act ("FPA") (16 U.S.C. § 792 et seq.). SAR Powerhouses 1 and 3 were built in the late 1800's and early 1900's, respectively, and operate pursuant to a Federal Energy Regulatory Commission ("FERC") license for Project No. 1933, effective as of May 1, 1946.[1] SAR Powerhouse 3 previously operated pursuant to a FERC license for Project No. 2198, issued on May 20, 1959. The Project No. 2198 license was combined with the Project No. 1933 license in 1998. *Southern California Edison*, 82 F.E.R.C. ¶ 62,179 (1998).

Both powerhouses are operated in a "run-of-the-river mode." Water is diverted by small dams into unpressurized flowlines. Water proceeds slightly downgradient until it reaches a forebay, which is a small impoundment that marks the transition point between the unpressurized flowline and a pressurized pipeline ("penstock"). Water then falls through the penstock to the powerhouse turbine, which spins a generator to produce electricity. Water from Powerhouse 1 goes directly into the flowline for Powerhouse 3. Water from Powerhouse 3, the furthest downstream facility, is delivered into pipelines owned and operated by various water agencies that use the water for domestic and

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[1] The Project's original license was issued by the Federal Power Commission, the former name of the FERC.

agricultural purposes. *Southern California Edison*, 82 F.E.R.C. ¶ 62,179 at pp. 64,273 – 64,276 (1998); Administrative Record ("AR") 133; SCE Supplemental Excerpts of Record filed at the Court of Appeals ("SCESER") 19 at p. 4, Figure 1, and pp. 5-6. None of the Project diversion structures store water. River flows that are in excess of the Project water conveyance facility capacity will flow over the top of the small dams and down the SAR.

On April 29, 1994, two years prior to the existing, "original" license expiration date, SCE filed with FERC an application for a "new" license for Project No. 1933 ("Application").[2] AR 12; SCESER 3. The Application contained a substantial amount of Project related information, including water quality impacts. AR 12; SCESER 3, pp. 22-26. The FERC has not yet issued a new license for the Project.

On the same day, SCE also submitted a letter, dated April 25, 1994, to the California State Water Resources Control Board ("SWRCB") requesting a water quality certificate under Clean Water Act ("CWA") § 401(a)(1) (33 U.S.C. § 1341(a)(1)) (hereinafter referred to as a "401 Certificate"), as required by the FERC regulations for filing the Application with FERC for the issuance of the new license for the Project. A copy of the Application submitted to FERC was attached to the SWRCB letter application. AR 11; Petitioner's Excerpts of Record ("PER") 8.

On April 18, 1995, the SWRCB denied, without prejudice, the SCE application for a 401 Certificate for the new hydropower license for the Project. AR 22; PER 9. The SWRCB denial stated the application did not contain sufficient information to issue a 401 Certificate.

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[2] Under FERC terminology, an "original" license is the initial license issued for a hydropower project, whereas a "new" license is a subsequently issued long-term license for the same hydropower project.

AR 22; PER 9, p. 61. SCE filed a timely Petition for Reconsideration with the SWRCB and requested that the SWRCB hold the Petition in abeyance while SCE and the SWRCB staff worked to resolve the outstanding information needs of the SWRCB. AR 26, 28; PER 10, 11. The SWRCB concurred and held the Petition in abeyance through March 19, 2002. AR 28, 154, 224; PER 11, 18, 19. At about that time, SCE filed a new application for a 401 Certificate for the new FERC license for the Project, with the understanding that the SWRCB staff believed they had sufficient information to issue the 401 Certificate. The SWRCB issued a 401 Certificate for the new license for the Project on March 13, 2003. *California Trout Petition for Writ of Certiorari* ("Pet.") at 4.

The FERC issued original license for the Project had a term of 50 years, effective as of May 1, 1946. On May 7, 1996, the FERC published the "Notice of Authorization for Continued Project Operation" ("Notice") pursuant to FPA § 15(a)(1) (16 U.S.C. § 808(a)(1)) and the FERC regulations at 18 C.F.R. § 16.18(a). 61 Fed. Reg. 22043 (1996); AR 56. The Notice granted SCE an automatically renewing annual license authorizing SCE to continue operating the Project after the original license expired on May 1, 1996. SCE did not file an application with the SWRCB for a 401 Certificate for an annual license at any time prior to or after the FERC Notice. The SWRCB neither approved, denied, waived, nor required a 401 Certificate for the Project's annual license.

Importantly, the Court should not confuse the SWRCB's action on the 401 Certificate for the Project's long-term new license under the ongoing FERC relicensing process with the issue of whether a 401 Certificate is needed for FERC to issue the Project an annual license. These two issues are entirely separate and only the latter issue is raised in the Petition.

ARGUMENT

A. The Petitioner Fails to Meet the Criteria for the Supreme Court to Grant the Petition.

The Petitioner does not show any compelling reason for this Court to grant the Petition. The Ninth Circuit Court of Appeals ("Court of Appeals") decision is consistent with three other Circuit Court decisions dealing with the FERC issuance of an annual license under FPA § 15(a)(1) in similar circumstances. The decision also conforms to Environmental Protection Agency regulations designed to implement CWA § 401. Additionally, the Court of Appeals followed applicable Supreme Court precedent when harmonizing the application of both FPA § 15(a)(1) and CWA § 401. Finally, the Court of Appeals gave the appropriate level of deference to the FERC interpretation of FPA § 15(a)(1). Petitioner claims that the Court of Appeals decision conflicts with (i) the plain meaning of FPA § 15(a)(1) and CWA § 401(a)(1), (ii) the U.S. Environmental Protection Agencies definition of "federal license" under CWA § 401, and (iii) various U.S. Supreme Court and Circuit Court of Appeals decisions. However, the Petitioner's assertions of conflict and improper use of deference do not exist, nor are there any other compelling reasons for this Court to grant the Petition.

B. The Finding that a 401 Certificate is Not Required for an FPA § 15(a)(1) Annual License is Consistent With Applicable Law.

1. The Court of Appeals Decision Comports With Other Federal Court Decisions.

The Court of Appeals decision is accurate, uncomplicated, and conforms with settled law regarding the issuance of annual licenses pursuant to FPA § 15(a)(1). Petitioner argues that the Court of Appeals

erred in finding that an FPA § 15(a)(1) annual license is not subject to CWA § 401. (Pet. 11) However, the Court of Appeals decision relies upon three other Circuit Court decision to conclude that FERC was correct in interpreting the nature of an annual license under FPA § 15(a)(1) and that FERC had a nondiscretionary duty to issue an annual license, without a 401 Certificate. (Pet. 10a)

In three analogous instances, the D.C. Circuit Court of Appeals upheld the non-discretionary issuance of an annual license under FPA § 15(a) despite other statutory restrictions on the FERC issuance of a new license for a hydropower project. For instance, the Court of Appeals agreed with the D.C. Circuit Court in *Platte River Whooping Crane v. FERC*, 876 F.2d 109, 114 (D.C. Cir. 1989) ("*Platte I*") and concluded that "the issuance of annual licenses is a 'non-discretionary act, in that the Commission has no choice but to issue the [annual] licenses to the existing licenses'." (Pet.10a) The Court of Appeals stated that FERC issuance of an annual license is consistent with the intent of FPA § 15(a)(1) to prevent a hiatus in Project operation during the period FERC is processing an application for a new license.

The Court of Appeals reliance on *Platte I, Platte River Whooping Crane v. FERC*, 962 F.2d 27, 32-33 (D.C. Cir. 1992) ("*Platte II*"), and *Lac Courte Oreilles Band v. Federal Power Commission*, 510 F.2d 198, 205-06 (D.C. Cir. 1975) ("*Lac Courte*") is well placed. Each case noted that FERC has no discretion but to issue an annual license upon the expiration of an existing license if the circumstances set forth in FPA § 15(a)(1) are triggered. Those circumstances apply here: (i) SCE filed an application for a new license; (ii) FERC has not yet acted on the license application; and (iii) the existing license has expired. And, unlike the *Platte I* expired license, the SCE Project license did not contain a provision that would have allowed the FERC to add water quality

conditions to the annual license. (Pet. 11a) Moreover, as noted in the FERC Order Dismissing Request for Rehearing and Denying Petition, no evidence was provided to FERC that indicated a water quality problem existed at the Project. (Pet. 31a)

In *Platte II* and *Lac Courte,* the D.C. Circuit was faced with the issue of requiring FERC to meet another statutory requirement before issuing an annual license to a hydropower project whose FERC license had expired. In both cases, the court concluded that the non-discretionary act of issuing an annual license was appropriate. The court in *Platte II* considered the claim that Endangered Species Act consultation with the U.S. Fish and Wildlife Service must be conducted prior to FERC issuing an annual license. The court stated that the issuance of the annual license did not require ESA consultation despite the known presence of a listed species being adversely impacted by the hydropower project. *Platte* II, at 33, n. 2; *see also Sierra Club v. Babbitt*, 65 F.3d 1502, 1509 (9th Cir. 1995)

Similarly, the analysis in *Lac Courte* compels the same result. The court in *Lac Courte* evaluated whether the mandatory finding that FERC must make under FPA § 4(e) to authorize the issuance of a new license on a federal reservation applied to the issuance of an annual license.[3] *Lac Courte,* 510 F.2d at 205-209. The court reviewed the purpose of issuing an annual license under FPA § 15 and concluded that, even if the Indian petitioners effectively had the power to veto a long-term license pursuant to FPA § 4(e) because the hydroelectric project would be inconsistent with the purpose of the Indian reservation, "Commission and congressional

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[3] The first proviso of FPA § 4(e) states "Provided, That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, ...". FPA § 4(e), 16 U.S.C. § 797(e).

action is proper even significantly after the license expiration date, and interim licenses should issue so long as the Commission is proceeding in good faith with the hearings necessary to make a proper disposition of the project." *Id.* at 207. The statutorily required finding of "consistency" with the purpose of a reservation under FPA § 4(e) is fundamentally no different than the CWA § 401(a)(1) requirement of "consistency" with water quality standards. If a hydropower project is on a federal reservation or if a project results in a discharge to navigable waters, FERC may not issue a new license without an FPA § 4(e) consistency finding or a 401 Certificate or waiver thereof, respectively. However, following the *Lac Courte* analysis, neither requirement applies to the issuance of an annual license.

Petitioner claims that a host of cases, lead by *PUD No. 1 of Jefferson County v. Washington Department of Ecology,* 511 U.S. 700 (1994) ("*Jefferson County*"), require a 401 Certificate before FERC may issue an annual license. However, the cases are not on point. *Jefferson County* involved the issuance of an original license for a new hydropower project where construction in the river would clearly require a 401 Certificate. Given the construction, the *Jefferson County* decision noted that the parties did not contest the "discharge" issue. Id at 711. Here, neither the Court of Appeals nor FERC has concluded that a discharge is present.[4]

Moreover, the Petitioner's cited cases, including *Jefferson County,* do not involve FERC issuance of an annual license. Each case deals with a person seeking discretionary federal approval of an action that may

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[4] SCE does not believe that a "discharge to navigable waters" occurs at the Project because all the diverted water is delivered into a water distribution system. (Pet. 3a). This issue was not addressed by the Court of Appeals or FERC.

result in a discharge to navigable waters. [5] No case involved a nondiscretionary annual license for which an existing hydropower project licensee did not file an application. Unlike *Platte River II* and *Lac Courte,* the Petitioner's cited cases are not even analogous to the situation at hand.

Another distinguishing factor from the cases cited by Petitioner is that no "applicant" exists for an annual license. A 401 Certificate is only necessary for "any applicant" for a federal license or permit that may result in a discharge to navigable waters. FERC regulations do not require or authorize an application for an annual license. The SWRCB regulations regarding 401 Certificates do not require an application for an annual license.[6] Moreover, SCE did not file an application for an annual license.

That an applicant must seek a federal approval to be subject to CWA § 401 is also consistent with the Environmental Protection Agency ("EPA") regulations cited by Petitioner as evidence that an annual license is a "federal license" requiring a 401 Certificate. (Pet. 22) While the EPA regulations at 40 C.F.R. § 121.1(a) implementing CWA § 401 define "license or permit" to include any license or permit granted by a licensing agency, the EPA Regulations contain additional relevant guidance. The EPA regulations also define "licensing or

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[5] *Alabama Rivers Alliance v. FERC,* 325 F.3d 290 (D.C. Cir. 2003) dealt with an application for a FERC license amendment; *Keating v. FERC,* 927 F.2d 616 (D.C. Cir. 1991), *City of Fredericksburg v. FERC,* 876 F.2d 1109 (4th Cir. 1989), and *American Rivers v. FERC,* 129 F.2d 99 (2nd Cir. 1997) each concerned the issuance of a new or original hydropower license sought by a license applicant.

[6] Title 23, California Code of Regulations, Section 3855(b)(1)(B)(2) requires a 401 Certificate for a hydroelectric facility when the proposed activity requires a FERC license or amendment. Here, SCE is not proposing to conduct an activity for which an annual license is required. Instead, FERC is required to issue the annual license when the existing license expires.

permitting agency" as "any agency of the Federal Government to which application is made for a license or permit". 40 C.F.R. § 121.1(b) (emphasis added). In fact, FPA § 15(a)(1) makes clear that an application for an annual license is unnecessary because the FERC issuance of an annual license arises by operation of law, not through the discretion of FERC. *Lac Courte*, 510 F.2d at 204.

Although the Court of Appeals did not site to Administrative Procedure Act ("APA") § 9(b) (5 U.S.C. § 558(c)), this provision also requires FERC to issue an annual license, with the existing license's terms and conditions, to an applicant for a new license for an existing project if the current project license has expired and FERC has yet to act on the outstanding license application. FERC has no discretion to act otherwise.

2. The Court of Appeals Appropriately Harmonized the Two Statutes.

Petitioner argues that the Court of Appeals failed to harmonize CWA § 401 and FPA § 15(a)(1) in the "right" way, i.e. the way that Petitioner believes the statutes should be interpreted. Fortunately, the Court of Appeals did everything necessary to harmonize the statutes in accordance with accepted legal principles. As Petitioner admits, repeals by implication are not favored. Given that admonition, the Court of Appeals followed this Court's guidance in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1017 (1984) and *Morton v. Mancari*, 417 U.S. 535, 550 (1974), and the D.C. Circuit's opinion in *Monongahela Power Co. v. Marsh*, 809 F.2d 41, 53 (D.C. Cir. 1987). The resulting conclusion is unsurprising: that the CWA, a general statute having broad application to all federal licenses that may result in discharges to navigable waters, should not control the application of FPA § 15(a)(1), a specific statute concerning what

happens to the operation of an existing hydropower project whose license expires and for which a new license application has been filed. (Pet. 12a)

Petitioner's citation to *Monongahela Power Co. v. Marsh* is misplaced. Petitioner argues that because the *Monongahela* court did not find that the FPA preempted the CWA, the CWA must therefore control the FPA. Petitioner misses the point of the Court of Appeals decision – that the application of the two statutes must be harmonized appropriately. The Court of Appeals finding regarding harmonization is nearly identical to the conclusion in the *Platte II* decision. There, the D.C. Circuit considered the application of the Endangered Species Act consultation requirement for all federal actions in the context of the FPA § 15(a)(1) annual license requirement. The court concluded that the FERC must issue an annual license to a license applicant despite the Endangered Species Act requirement for federal agencies to engage in consultation prior to issuing a new license for the project. *Platte II* at 33, n.2.

Furthermore, this conclusion is the only practical way to harmonize FPA § 15(a)(1) with CWA § 401. Petitioner would have this Court believe that a 401 Certificate is required for each and every FERC issued annual license. That scenario would make little sense. The SWRCB was unable to issue a 401 Certificate for the SCE Project until March 13, 2003, almost seven years after the original license expired. If the SWRCB could not issue a 401 Certificate during the almost nine year period after SCE had filed with the SWRCB in 1994 an application for a 401 Certificate for a new hydropower license, the claim that the SWRCB could have issued an annual 401 Certificate for each of the six years after the Project license expired is completely unsupported. As Petitioner points out, CWA § 401 is designed to ensure that "activities will be conducted in a manner that will not reduce the quality of water below the applicable

water quality standards." (Pet. 13) Thus, if Petitioner were correct, the process that the SWRCB would need to undertake to issue a 401 Certificate for an annual license would be the same as the process for issuing a 401 Certificate for a new license.

If the SWRCB could not issue a 401 Certificate for the Project until March 2003, no reason exists to believe that the SWRCB could have issued a 401 Certificate for the Project's annual license any sooner.[7] Under this situation, the Petitioner's alternative would have resulted in the Project shutting down between May 1996 and March 2003, a result that would be in direct conflict with the intent of FPA § 15(a)(1) to allow hydropower projects to continue in operation after license expiration while FERC processes the application for a new license. Thus, the Ninth Circuit harmonized the two statutory provisions in the only manner practical to give effect to both statutes.

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[7] Petitioner's reference to a letter from the California Attorney General that opines a 401 Certificate for an annual license would be timely issued carries no weight. The California Attorney General's office does not issue 401 Certificates. Moreover, the actual practice of the SWRCB proves the opposite is true. In fact, a FERC report discussing hydroelectric licensing found that the "most common cause of long-delayed proceedings is untimely receipt of state water quality certification under the Clean Water Act." FERC Report on Hydroelectric Licensing Policies Procedures, and Regulations, Comprehensive Review and Recommendations Pursuant to Section 603 of the Energy Act of 2000, (May 8, 2001) *available at* http://www.ferc.gov/hydro/docs/section603.htm.

C. *Chevron* Deference is Appropriate to FERC's Interpretation of Federal Power Act § 15(a)(1).

Petitioner argues that the Court of Appeals deference to the FERC's decision that an annual license does not require a 401 Certificate is inconsistent with this Court's decision in *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984). (Pet. 25) Petitioner twists the Court of Appeals decision to reach this inaccurate conclusion. At the beginning of its substantive discussion, the Court of Appeals stated that "The Commission's interpretation of the CWA is not entitled to deference. [citation omitted] However, we do give *Chevron* deference to the Commission's interpretation of the FPA." (Pet. 5a) The Court of Appeals went on to find that FERC interpreted properly FPA § 15(a)(1) to conclude that the issuance of an annual license is a ministerial and nondiscretionary action. (Pet. 10a) The FERC's interpretation goes to the character of FERC's act of issuing an annual license; i.e. does FERC consider its own actions to be the issuance of a federal license. FERC does not offer an opinion as to how CWA § 401 should be interpreted. The Court of Appeals explained that FERC's interpretation is consistent with other court decisions on this topic. In fact, the FERC authorization to SCE was entitled a "Notice of Authorization for Continued Project Operation." Unlike FERC orders dealing with the issuance of licenses or license amendments, FERC does not characterize the "annual license" as a federal license when the license holder is given approval to continue operating a licensed hydroelectric project after a license expires. Thus, the *Chevron* deference rule was properly applied in this instance.

CONCLUSION

The Ninth Circuit Court of Appeals decision is important to SCE's ability to continue to operate the Project while FERC processes the SCE Application for a new license. Importantly, the Court of Appeals did not depart from established legal precedent in finding that FERC properly interpreted and applied FPA § 15(a)(1) to the SCE Project annual license. Rather, the decision is consistent with analogous Supreme Court and Circuit Court decisions. The Petitioner's claims of error and conflict are unsupported. Therefore, SCE respectfully requests that this Court deny the Petition.

Respectfully submitted,

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